David Allen Company and International Union of Bricklayers and Allied Craftsmen, Local 1 of Maryland, Virginia and District of Columbia, AFL–CIO. Case 5–CA–26464(E)

August 27, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On May 6, 1998, Administrative Law Judge Steven M. Charno issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Applicant filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision and Order.

The complaint in the underlying proceeding alleged that the Applicant, the Respondent below, violated Section 8(a)(1) and (3) of the Act by failing to hire or consider for hire employees who had engaged in concerted protected activity. A hearing was held on November 3-5, 1997, and at the close of the General Counsel's case-in-chief, the Applicant moved for a dismissal of the complaint. The administrative law judge heard oral argument and issued a bench decision dismissing the complaint. No party filed exceptions, and the Board adopted the judge's findings and recommendations, pro forma, in an unpublished January 21, 1998 Order.

On February 11, 1998, the Applicant applied to the Board for an award of fees and expenses under the Equal Access to Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations. The judge granted the Respondent's request, finding that the General Counsel was not substantially justified in issuing the complaint. In doing so, the judge rejected the General Counsel's argument that resolution of the underlying decision turned on several credibility issues. He also concluded that the General Counsel's position was not based on a novel, but credible, interpretation of existing law. The judge therefore recommended granting the application.

The General Counsel excepts to the judge's supplemental decision. As explained below, we reverse and find that the General Counsel was substantially justified in issuing the complaint and proceeding to hearing in this case. Accordingly, we deny the application.

The judge's findings of fact in the underlying case are as follows: The Respondent is a Virginia corporation engaged in the construction business installing tile for customers located in the Washington, D.C. metropolitan area. The Respondent was awarded a contract for the ceramic and tile work installation on the Federal Triangle Project in Washington, D.C. From approximately March 12, 1996, to April 18, 1996, the Respondent subcontracted most of the tile work on the project to Moore Ceramic and Tile (Moore).

Peggy Moore was president and owner of Moore, and her husband, Robert "Johnny" Moore (Johnny Moore), was the secretary and treasurer. During the time that Moore was a subcontractor for the Respondent, Johnny Moore was also the Respondent's field superintendent, and he continued in that position after Moore's removal from the project. Leroy Kidwell, Danny Kilburn, and Francis Larkin (the alleged discriminatees) were Moore employees. During the time period that Moore was working on the Federal Triangle Project, Kidwell, Kilburn, and Larkin filed a complaint with the U.S. Department of Labor regarding Moore's alleged failure to pay them the prevailing wage rate. Peggy and Johnny Moore knew of the wage complaint. On approximately April 18, 1996, the general contractor, after determining that Moore was not in compliance with certain insurance requirements, removed Moore from the project. Moore subsequently laid off its employees, including Kidwell, Kilburn, and Larkin.

The General Counsel's precomplaint investigation revealed conflicting accounts of the events occurring between April 18, 1996, and May 5, 1996. Kidwell, Kilburn, and Larkin's affidavits state that they repeatedly contacted Johnny and Peggy Moore seeking employment and were informed that no positions were available. These employee affidavits do not mention whether Johnny Moore informed them about job opportunities with the Respondent.

James Cecil Roberts, a former Moore employee who did not participate in the wage complaint, stated in his affidavit that he could not recall the exact date, but "it was in April 1996" that Peggy Moore told him that no work was available. However, "later that same evening, [he] received a call from Peggy Moore who told [him] that they had talked to [the Respondent] . . . that she would be working for [the Respondent] . . . and that [he] would be brought back to work employed by [the Respondent] . . . Peggy told [him] that Francis, Danny, and Leroy would not be coming back." According to Roberts, the Respondent hired another former Moore em-

ployee who did not participate in the wage complaint. Roberts' affidavit also stated that Johnny Moore told Roberts "not to get involved" with the wage complaint and that, if he did, the Respondent "would probably let [him] go." When Roberts returned to Federal Triangle as an employee for the Respondent, Johnny Moore told Roberts that "Francis, Leroy and Danny were no good because they turned their backs on the company."

Johnny Moore, however, stated in his affidavit that on April 26, 1996, he told Kidwell, Kilburn, and Larkin that the Respondent was hiring and that they should apply. Johnny Moore stated that Kidwell, Kilburn, and Larkin indicated that they were not interested in working for the Respondent. Likewise, in her affidavit, Peggy Moore stated that she was present when Johnny Moore informed Kidwell, Kilburn, and Larkin of the job opportunities with the Respondent and that they did not appear interested. Further, Peggy Moore stated that Moore went out of business on May 3, 1996, and that she returned to the Federal Triangle Project as an employee for the Respondent on or about May 9 or 10, 1996.

At hearing, Aristotle Koutris, the Respondent's senior project manager, testified that, after Moore was removed from the Federal Triangle project, he told Johnny Moore to hire the former Moore employees and to pass out applications to all of those employees. Johnny Moore testified that he told Kidwell, Kilburn, and Larkin about employment opportunities with the Respondent and gave them job applications. However, Kidwell, Kilburn, and Larkin testified that Johnny Moore never told them that they could apply for a position with the Respondent.

In his recommendation granting the Respondent's motion to dismiss, the judge first determined that Kidwell, Kilburn, and Larkin engaged in protected activity, that this activity caused Johnny Moore's animus toward them, that Johnny Moore was a supervisor for the Respondent, and that his animus toward the alleged discriminatees could be attributed to the Respondent. Nevertheless, the judge found no evidence of an unlawful refusal to hire or to consider for hire. Rather, the judge determined the central issue to be whether it was an unfair labor practice for the Respondent to fail to solicit applications from, or fail to hire, potential employees against whom the Respondent bears animus, when those employees did not apply for or express an interest in employment with the Respondent. The judge determined that none of the alleged discriminatees applied for a job with the Respondent, and that the Respondent's failure to solicit applications from or to hire Kilburn, Kidwell, and Larkin did not constitute an unfair labor practice. Specifically, the judge found no evidence showing that the Respondent discouraged the alleged discriminatees from applying for employment. In making his recommendation, the judge discredited Roberts' statements regarding the issue of when Peggy Moore informed him of the job opportunity with the Respondent and determined that neither Peggy nor Johnny Moore was aware at any time before May 5, 1996, of any employment opportunity with Respondent.

In his supplemental decision, the judge rejected the General Counsel's contention that his decision turned on resolution of credibility, stating that the basis of his decision was the lack of evidence showing that Kidwell, Kilburn, and Larkin had sought employment with the Respondent. The judge also rejected the General Counsel's contention that his position was substantially justified because it was based on a novel but credible interpretation of existing law.

We find, contrary to the judge, that the General Counsel was substantially justified in issuing the complaint and proceeding to hearing at which the judge could assess the credibility of witnesses and weigh the evidence in light of those findings. Under EAJA, a party who has prevailed in litigation before a federal government agency is entitled to an award of attorney's fees and expenses incurred in litigation unless the government can establish that its position was "substantially justified." *Blaylock Electric*, 319 NLRB 928, 929 (1995). The United States Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552 fn.2 (1988), defined the phrase "substantially justified" as meaning "justified to a degree that could satisfy a reasonable person" or "justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Further, the fact that the Government did not prevail on the merits does not give rise to a presumption that its position was unreasonable, and the "substantially justified" standard does not require the Government to establish that its decision to litigate was based on substantial probability of prevailing. *Carmel Furniture Corp.*, 277 NLRB 1105, 1106 (1985). The Government's position can still be deemed reasonable in fact and law notwithstanding that the General Counsel failed to establish a prima face case. Id. However, where the General Counsel presents evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct, the General Counsel's position is deemed to be substantially justified within the meaning of EAJA. *SME Cement, Inc.,* 267 NLRB 763 fn1 (1983). Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of a proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative law judge. Accordingly, where the General Counsel is compelled by

the existence of a substantial credibility issue to pursue the litigation, and thereafter presents evidence which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in law and fact and is substantially justified. *Barrett's Contemporary & Scandinavian Interiors,* 272 NLRB 527 (1984).

We disagree with the judge that the issue was whether the Respondent's failure to solicit applicants against whom it had demonstrated animus constituted an unfair labor practice when the employees had not applied for or expressed an interest in employment with the Respondent. Rather, the issue was framed by the evidence adduced by the General Counsel during the investigation. That evidence, if credited, showed that Respondent's agent, Johnny Moore, bore animus against the three alleged discriminatees because of their Section 7 activity. That evidence, again, if credited, indicated that, because of this animus, Moore discriminatorily failed to give them applications when he gave applications to others. Moreover, the investigation produced evidence that the alleged discriminatees had contacted Johnny and Peggy Moore seeking employment only days before the Respondent began hiring hourly workers for the project. The issue is whether this failure was unlawful, even though it was contrary to instructions of the Respondent's higher officials who told Johnny Moore to give applications to everyone. We find that the General Counsel's pursuit of a resolution of this issue had a reasonable basis both in law and in fact.

In *Service Operations Systems*, 272 NLRB 1033 (1984), the Board held that an employer violates Section 8(a)(3) when that employer knows of potential employees who are interested in employment and, because of antiunion animus, prevents those employees from applying for positions. In that case, a janitorial service bid for and won a contract to clean a Federal office building. In the past, when different contractors were awarded this contract, those contractors had hired the employees of the preceding contractor. When Service Operations Systems was awarded the contract, its owner openly expressed his dislike of the union that represented the preceding contractor's employees. When those employees sought employment applications from the new contractor, they were informed (falsely) that no applications were available. The Board upheld the judge's finding that the respondent's failure to provide incumbent employees the opportunity to apply for employment was due to the respondent's animus against the union and that such conduct violated Section 8(a)(3) of the Act. Cf. *M.P.C. Plating, Inc. v. NLRB*, 953 F.2d 1018 (6th Cir. 1992) (holding that General Counsel was not substantially justified in issuing a complaint against an employer for failing to hire temporary workers who never expressed an interest in permanent employment).

We find that the General Counsel presented evidence in the underlying proceeding that, if credited, would have constituted a prima facie case that the Respondent violated Section 8(a)(3) by preventing the alleged discriminatees from applying for employment. The General Counsel's precomplaint investigation revealed the following: Kidwell, Kilburn, and Larkin filed a wage complaint against Moore, and Johnny and Peggy Moore knew of that complaint. Following the demise of the Moore enterprise, the Respondent hired at least two other former Moore employees. However, the employees who participated in the wage complaint were not hired. The General Counsel argued that Johnny Moore acted as an agent of the Respondent, and that, because of his animus toward the three employees, he interfered with their prospects for employment with the Respondent. Affidavits reflected discrepancies in testimony as to whether Johnny Moore knew of the job opportunities at Respondent during the time that the alleged discriminatees were contacting the Moores seeking employment and whether he refused to pass on that information to them. Thus, by issuing this complaint, the General Counsel sought to resolve a substantial credibility issue concerning the Moores' knowledge of job opportunities with the Respondent and their alleged failure to inform Kidwell, Kilburn, and Larkin of those opportunities.

Further, at hearing, the General Counsel presented evidence, which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct. As the judge concluded, the evidence was sufficient to show that the alleged discriminatees engaged in protected concerted activity, that Johnny Moore bore animus towards them because of that activity, that Johnny Moore was a supervisor of the Respondent, and that his animus could be attributed to the Respondent. Testimony revealed that Johnny Moore received instructions to hire all former Moore employees, and Johnny Moore testified that he provided all former employees with applications. Disputing the latter claim, Kidwell, Kilburn, and Larkin testified that they never received applications. Further, faced with conflicting accounts, the judge credited Johnny and Peggy Moore's testimony, finding that they did not know of any job opportunities during the time that the alleged discriminatees were seeking employment. There was no evidence showing that the Moores actively discouraged the alleged discriminatees from seeking employment with the Respondent. The judge also discredited Roberts' testimony that Peggy Moore told him of the job opportunity with the Respondent in April. However, had the judge credited the testimony of

the alleged discriminatees and Roberts, he could have found that Johnny Moore knew of the positions with the Respondent at the time that the alleged discriminatees contacted the Moores seeking employment, that Johnny Moore never told them about those positions, and that, in failing to do so, Johnny Moore prevented them from applying for those positions.

In view of the above, we find that the General Counsel was substantially justified in issuing the complaint and further find that the General Counsel initially presented evidence, which if credited by the judge, would have constituted a prima facie case of a 8(a)(3) violation. Accordingly, we dismiss the application for attorney fees and expenses.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jonathan W. Greenbaum, Esquire (Krupin, Greenbaum & O'Brien, LLC) of Washington, D.C. for the Applicant.

Brenda Valentine Harris, Esquire, of Baltimore, Maryland for the General Counsel.

SUPPLEMENTAL DECISION

STEVEN M. CHARNO, Administrative Law Judge. On April 16, 1997, General Counsel issued a complaint which alleged that David Allen Company (Allen) had violated Section 8(a)(1) and (3) of the National Labor Relations Act by failing and refusing to rehire employees who had engaged in concerted activities for the purpose of mutual aid and protection. Allen denied the commission of any unfair labor practice, and a hearing was held before me in Washington, D.C. on November 3–5, 1997. At the close of General Counsel's case-in-chief, I heard oral argument and gave a bench decision in favor of Allen. A Decision and Certification adopting the bench decision was issued November 26, 1997. No exceptions were filed, and the Board adopted my findings by Order of January 21, 1998.

On February 11, 1998, Allen filed an Application for Attorneys' Fees and Expenses (Application) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (EAJA), and the Board's Rules and Regulations, 29 C.F.R. § 102.143 et seq.[1] The Application was referred to me for disposition by the Executive Secretary's Order dated February 12, 1998. The General Counsel's answer of March 17, 1998, urged that the Application be denied because the government's position in the unfair labor practice proceeding was substantially justified. Allen filed an April 7, 1998, reply to General Counsel's answer.

FINDINGS OF FACT

I. PROPRIETY OF AN AWARD

Section 504(a)(1) of EAJA provides that an award of reasonable attorneys' fees may be made to a party prevailing against the Government unless "the position of the agency . . . was substantially justified." The term "substantially justified" has been defined as "justified to a degree that could satisfy a reasonable person" or as having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Board has long held that credibility issues, which cannot be resolved after a thorough investigation by the Board's General Counsel, must be decided at a hearing before an administrative law judge. E.g., *Alpha-Omega Electric, Inc.*, 312 NLRB 292, 293 (1993). Where litigation is necessitated by the existence of a substantial credibility issue and General Counsel presents a prima facie case at the hearing, his position is deemed to have a reasonable basis in fact and law and to be substantially justified. *Barrett's Contemporary & Scandinavian Interiors*, 272 NLRB 527, 528 (1984); *SME Cement, Inc.*, 267 NLRB 763 (1983).

Allen, a Virginia building contractor, was awarded a contract for tile work at the Federal Triangle Project in Washington, D.C. and, on or about March 12, 1996, subcontracted that work to Moore Ceramic and Tile (Moore), a firm founded by Johnny Moore and run by his wife Peggy Moore. Allen and Moore were not alter egos or joint employers. Moore employees Kidwell, Kilburn, and Larkin, during the course of their employment with Moore, concertedly filed wage-and-hour complaints against their employer, a fact known contemporaneously to both Johnny and Peggy Moore. On or about April 18, 1996, the general contractor at the Federal Triangle Project removed Moore from the project, and the latter laid off all of its employees. Between April 19 and May 5, 1996, Kidwell, Kilburn, and Larkin repeatedly contacted Johnny and Peggy Moore concerning reemployment by Moore and were told that no positions were available. On May 10, 1996, Allen began hiring additional employees, including Peggy Moore, to finish the tile work at the Federal Triangle Project. Johnny Moore was an admitted supervisor for Allen on that project and made hiring recommendations. There is no evidence that either Johnny or Peggy Moore knew, on or before May 5, that Allen would finish the job itself. After being employed by Allen and acting as its agent, Peggy Moore contacted at least one of her former employees and suggested that he apply to Allen for work at the Federal Triangle Project, but she did not make a similar suggestion to Kidwell, Kilburn, or Larkin. Neither Kidwell, Kilburn, nor Larkin ever inquired about or applied for employment with

[1] Allen's unopposed motion to withhold confidential information from public disclosure convincingly argues that disclosure of its financial information would have an adverse impact on its competitive ability without significantly serving the public interest. Upon consideration, the motion is granted.

Allen on the Federal Triangle Project. All of the foregoing facts were drawn from completely uncontroverted evidence.[2]

The principal issue presented by the complaint in this case was whether Allen "failed and refused to hire or consider for hire" Kidwell, Kilburn, or Larkin as a result of their alleged concerted protected activities during their employ by Moore. I concluded that (1) the three alleged discriminatees had engaged in concerted protected activities while employed by Moore, (2) the demonstrated animus of Johnny Moore toward those activities could be attributed to Allen, the employer for which he was a supervisor, (3) the three alleged discriminatees never sought employment with and were never denied employment by Allen and (4) General Counsel was unable to supply any legal authority for the proposition that an employer is required to solicit job applications from potential employees against whom it bears demonstrated animus. Based on the foregoing conclusions, I issued a bench decision in Allen's favor at the close of General Counsel's case-in-chief.

In opposing the instant application, counsel for the General Counsel contends that my decision turned on several credibility resolutions. Specifically, she argues that she would have prevailed if I had credited Cecil Roberts' testimony going to the question of whether Allen bore animus toward the protected activities of the alleged discriminatees. Because I determined that Allen possessed the animus in question, my findings concerning Roberts' credibility were without decisional significance.[3] Second, counsel for General Counsel argues that, had I credited Roberts' somewhat imprecise testimony that Peggy Moore's conversation with him about a future job with Allen took place on May 6, the outcome of the case would have changed. In fact, Peggy Moore could have been ignorant of Allen's hiring plans on May 5 and first become aware of them on May 6; indeed, it is not unlikely that she would have made the call to Roberts immediately after learning of Allen's plans. Accordingly, the testimony in question is also immaterial to my decision. Third, counsel for General Counsel contends that, had I found that Peggy Moore was one of Allen's supervisors,[4] I would have decided the hiring issue against Allen. Given that Peggy Moore's supervisory status goes to the same question of animus discussed above, together with the fact that my decision was based on the alleged discriminatees' uncontested failure to seek employment with Allen, I reject this contention.[5]

Finally, the answer to the Application contends that General Counsel's position was substantially justified because that position was based on a novel interpretation of existing law,[6] i.e., the argument that employers are required to solicit job applications from potential employees against whom those employers bear demonstrated animus. The day before oral argument was heard in the underlying case, I put counsel for General Counsel on notice that I wished to be apprised of any and all authority which might support such an interpretation of existing law. No such authority was provided during oral argument and, in response to my iterated request, counsel for General Counsel stated that she was "not aware of any case authority." I therefore find that General Counsel did not institute or try this case in order to advance a novel interpretation of existing law. Accordingly, I find the legal theory articulated in the answer to be nothing more than a post hoc rationalization without demonstrated motivational significance. For the foregoing reasons, I find that General Counsel has not demonstrated that (1) its case had a reasonable basis in fact and law, and (2) its position in the unfair labor practice litigation was substantially justified. Accordingly, I conclude that Allen is entitled to appropriate fees and expenses.

II. AMOUNT OF AWARD

A. Fees in Excess of $125 an Hour

Allen has claimed fees for attorneys and legal assistants based on hourly rates ranging from $80 to $240. Fees in excess of $125 an hour may be awarded only when an agency has so provided by rule or regulation. 5 U.S.C. § 504(b)(1)(A). Inasmuch as the Board has never adopted such a rule or regulation, the fees which comprise a portion of this award will be limited to $125 an hour.

B. Reasonableness of Fees Claimed in Application

Allen's Application seeks $16,496 in fees and expenses of $1,157.35.[7] Although General Counsel does not challenge the reasonableness of any of these fees or expenses, I find the inclusion of time spent to prepare an unfair labor practice charge against the charging party to be beyond the proper scope of the Application and shall exclude it.

CONCLUSIONS OF LAW

1. On April 16, 1997, the date on which the original complaint in the underlying unfair labor practice proceeding was issued, Allen was a corporation with fewer than 500 employees and a net worth of less than $7 million.

2. Allen prevailed in a significant and discrete substantive portion of the underlying unfair labor practice proceeding, which was an adversary adjudication.

3. General Counsel's position in a significant and discrete substantive portion of the underlying unfair labor practice proceeding was not shown to be substantially justified.

---

[2] General Counsel contests the fact that Peggy Moore was hired by Allen on May 10. Contrary to General Counsel's argument in this proceeding, the finding to that effect did not involve the resolution of a credibility conflict; indeed, all testimony on the question supported the finding. General Counsel's argument appears to be based on a speculation that Moore's employment application was originally dated prior to May 10—a speculation which is totally without evidentiary support.

[3] The one finding with respect to Roberts' credibility which could have had an impact on the ultimate decision was my crediting his testimony that Peggy Moore had told him of the job with Allen.

[4] This was actually a question of the probative value of evidence, rather than the credibility of witnesses.

[5] General Counsel also argues that the identity of the individuals who made Allen's hiring decisions, a question which arose for the first time after the hearing began, had some bearing on the outcome of the case. In fact, the matter was wholly irrelevant to my decision.

[6] See *Teamster Local 741 (A.B.F. Freight),* 321 NLRB 886 (1996).

[7] Exh. 2 to the Application states that Allen "shall supplement these fees to encompass fees expended to submit and finalize this EAJA Application, once those fees are calculated on our system." I did not receive such a supplement prior to issuing this Supplemental Decision.

4. Allen is entitled to attorneys' fees in the amount of $9550 and expenses in the amount of $1,157.35.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[8]

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Applicant, David Allen Company, Manassas, Virginia, shall be awarded $11,347.35 pursuant to its Application under the Equal Access to Justice Act.

IT IS FURTHER ORDERED that the Applicant's unopposed February 11, 1998 Motion to Withhold Confidential Information from Public Disclosure is granted.

Dated at San Francisco, California, this 6th day of May, 1998.